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No. 00-699

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 2000

HOWARD GREENBERG,

Petitioner,

v.

BEAR, STEARNS & CO., BEAR, STEARNS & CO., INC. AND BEAR, STEARNS SECURITIES CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

1. Should arbitral awards deciding claims under the federal securities laws be subject to a heightened standard of review not applicable to awards involving other statutory claims?

2. Did the Court of Appeals err in concluding that the arbitral award in this case, which was rendered by a three-member arbitration panel based on extensive witness testimony and other evidence, did not constitute a "manifest disregard of the law"?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Respondents Bear, Stearns & Co., Inc. and Bear, Stearns Securities Corp. are wholly-owned subsidiaries of The Bear, Stearns Companies Inc. Contrary to the captioned listing of parties in this case, there is no separate entity incorporated as "Bear, Stearns & Co."

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BRIEF IN OPPOSITION TO PETITION

INTRODUCTION

This Petition is Petitioner Howard Greenberg's third attempt to overturn the award (the "Award") of a National Association of Securities Dealers ("NASD") arbitration panel dismissing his claims after a full evidentiary hearing. Petitioner's principal contention is that "there should be applicable standards to vacate . . . an apparently irrational arbitration decision" under the Federal Arbitration Act (the "FAA"). Pet. at 16. In reality, such a standard already exists, and the Second Circuit properly applied it in affirming the district court's denial of Greenberg's petition to vacate the Award. The Petition fails to identify any conflict among the federal circuits concerning the "manifest disregard of the law" standard applied below, nor does it suggest that any other circuit would have reached a different result had it reviewed this case. Though Petitioner decries the purported unfairness of arbitrations conducted by the securities industry's self-regulatory organizations ("SROs"), he points to no evidence that the manifest disregard standard provides an inadequate level of review. Moreover, the Petition simply ignores the recent decision of this Court in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), which cited that standard with approval.

Far from raising a compelling legal question for review, Petitioner asks this Court to revisit the factual record and rule anew upon fact-bound issues decided by the arbitrators. The decision below correctly concluded that the the Award was rooted in findings of fact and witness credibility that should not be disturbed. Petitioner's repeated assertions that the pertinent facts are "undisputed" and "simple," *see* Pet. at 5, 9, 13, 14, 17, and that the Award is "irrational" and "perverse," *see id.* at 13, 15, 16, are refuted

by the record and were properly rejected. Indeed, the Petition fails even to address several independent factual and legal grounds supporting the Award. In any event, Petitioner merely challenges the lower courts' straightforward application of an accepted standard of review and therefore does not raise any issue warranting this Court's attention.

Even if the Petition raised compelling questions for review, the Court could reach those questions only if it first agreed with the Second Circuit's threshold conclusion that it had subject matter jurisdiction over Greenberg's petition to vacate pursuant to § 10 of the FAA, 9 U.S.C. § 10. This potentially dispositive issue might preclude this Court's consideration of the questions presented by Petitioner and makes this Petition particularly inappropriate for review. For these reasons, Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

OPINIONS BELOW

The opinion of the Second Circuit is reported at 220 F.3d 22 (2d Cir. 2000). The opinion of the District Court does not appear in an official reporter, but is accessible on the Westlaw electronic database at 1999 WL 642859 (S.D.N.Y. Aug. 23, 1999).

STATEMENT OF THE CASE

The Petition's "Statement of the Case" contains a lengthy and grossly misleading account of the factual record developed in the underlying arbitration. While most of the pertinent facts are recited accurately in the Second Circuit's opinion, *see* 220 F.3d at 24-25, the Petition's numerous factual misstatements call for a corrective response here.

Greenberg's claims arose from alleged investment losses he suffered as a customer of non-party Sterling Foster & Co., Inc. ("Sterling Foster"), an independent retail broker-

dealer, in 1995 and 1996. During that period, respondent Bear, Stearns Securities Corp. ("Bear Stearns"), a wholly-owned subsidiary of co-respondent Bear, Stearns & Co., Inc., provided "back-office" securities clearance services to Sterling Foster pursuant to an arms-length contract approved by the New York Stock Exchange.

The arbitration hearing extended over seven days between September and November 1998. The central focus of the hearing was the events surrounding the initial public offering ("IPO") of ML Direct, Inc. ("ML Direct") in September 1996. Greenberg contended that the ML Direct IPO was fraudulent because, *inter alia*, the IPO prospectus falsely represented that the underwriter had no "present intention" to release, for sale in the public secondary market, 2.4 million ML Direct shares held by so-called "selling shareholders" which were subject to a 12-month "lock-up" agreement. At the hearing, Respondents took no position concerning whether Sterling Foster had committed fraud, but denied any knowledge of such fraud and maintained that Bear Stearns merely provided customary back-office services to Sterling Foster by clearing the ML Direct transactions.

Contrary to Greenberg's assertion, it was not "undisputed" at the hearing that anyone reading the ML Direct prospectus provided to Bear Stearns would have known "beyond per adventure of doubt [*sic*]," Pet. at 5, about Sterling Foster's intention to commit fraud. As the Petition acknowledges, *see id.* at 6, Bear Stearns obtained only a preliminary prospectus prior to the ML Direct offering and therefore did not know the contents of the final document. (A 102, 112)[1] In any event, all Bear Stearns witnesses testified that they did not read the technical language of the

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[1] References to the Joint Appendix filed in the court below are cited as "A ____."

preliminary prospectus concerning sale restrictions and had no knowledge of any arrangements to release a lock-up agreement prior to the specified period. (A 110, 112, 134-38. 373.)

The Petition also incorrectly implies that only 1.1 million ML Direct shares were "set forth in the prospectus," and that Bear Stearns improperly "distributed . . . three times that number or 3.5 million shares." Pet. at 8. In fact, the ML Direct prospectus covered the registration of 3.5 million shares, comprising 1.1 million IPO shares and a separate 2.4-million share "shelf registration." (A 66-69.) Moreover, Bear Stearns did not "distribute" shares; as a clearing firm, it processed transactions in ML Direct executed by Sterling Foster in its customers' accounts. There was no allegation that ML Direct shares were sold without being properly registered or that Bear Stearns itself acted as an underwriter with respect to those shares. Bear Stearns also introduced evidence that the ML Direct stock certificates delivered to it for deposit to Sterling Foster's account were freely tradable and in proper form.

The Petition further mischaracterizes as "undisputed" Greenberg's contention that the sale of the selling shareholders' shares was a risky "short sale" and an "underwriting of a most unusual sort." Pet. at 5. To the contrary, there was evidence that the ML Direct offering merely resulted in a technical deficit, or short "position," in Sterling Foster's proprietary accounts, which was then eliminated by the delivery of additional shares. (A 130.) Moreover, Bear Stearns typically received certificates for public offering shares *after* the shares had been sold to customers; as a result, temporary short positions in such circumstances were not abnormal, but routine. (A 486, 104, 130.) Throughout the hearing, Bear Stearns vigorously contested and introduced evidence contradicting Greenberg's version of these events.

Also misleading is the Petition's vague assertion that Bear Stearns "handled" payments by Sterling Foster to "insiders" and knew that Sterling Foster reaped "a 400% profit" on the sale of selling shareholders' shares. Pet. at 8. At the hearing, Greenberg contended that Bear Stearns must have learned about such illegal profits from memoranda it received from Sterling Foster referencing the receipt of ML Direct shares and requesting that Bear Stearns issue checks in specified amounts against a Sterling Foster proprietary account. (A 276-77.) Bear Stearns denied that anyone at Bear Stearns had attempted to compute Sterling Foster's purchase price for such shares, and no Bear Stearns witness testified to the contrary. There was testimony that such a computation would have been both irrelevant to Bear Stearns' clearing functions and meaningless, since Bear Stearns could not determine whether other consideration not mentioned in the memoranda had been paid for the shares. (A 285.) As a clearing firm, Bear Stearns issued the checks without inquiry, provided that Sterling Foster's accounts contained sufficient equity to cover the payments. (A 276-77.)

In sum, the Petition ignores the abundant evidence presented to the arbitrators that Bear Stearns' actions were consistent with the normal provision of clearance services to introducing brokers and did not bespeak knowledge of Sterling Foster's alleged misconduct.

REASONS FOR DENYING THE PETITION

I. The Manifest Disregard Standard Is Applied in Every Federal Circuit and Has Been Approved By This Court.

The Petition vaguely challenges the Second Circuit's use of the "manifest disregard" standard in reviewing the Award and implies that a conflict exists among the circuit courts concerning the standard's validity. *See* Pet. at 10.

There is no such conflict, and this Court has recently indicated its approval of review for "manifest disregard."

Since *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled on other grounds*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), federal courts have cited "manifest disregard of the law" as a basis for vacating an arbitral award, in addition to the statutory grounds set forth in FAA § 10(a). In *Wilko*, the Court contrasted an arbitrator's mere legal misinterpretation or error with "manifest disregard" and indicated that only the latter constituted a valid basis to overturn an award. *See* 346 U.S. at 435-37. Today, "each of the ... numbered circuits and the D.C. Circuit have recognized manifest disregard of the law as either an implicit or nonstatutory ground for vacatur under the FAA." *Williams v. Cigna Financial Advisors, Inc.*, 197 F.3d 752, 759 (5th Cir. 1999).[2]

While this Court has not directly considered the manifest disregard standard since first enunciating it in *Wilko*, the Court's unanimous decision in *First Options of Chicago, Inc. v. Kaplan*, *supra*, reiterates and implicitly approves that standard. *First Options* concerned, *inter alia*, the standard of review to be applied to arbitrators' decisions on whether the parties had submitted a particular matter to arbitration. In analyzing the practical significance of this

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[2] *See, e.g.*, *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456 (11th Cir. 1997); *Barnes v. Logan*, 122 F.3d 820 (9th Cir. 1997), *cert. denied*, 523 U.S. 1059 (1998); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997); *M&C Corp. V. Erwin Behr GmbH & Co.*, 87 F.3d 844 (6th Cir. 1996); *United Transp. Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376 (3d Cir. 1995); *Remmey v. PaineWebber, Inc.*, 32 F.3d 143 (4th Cir. 1994), *cert. denied*, 513 U.S. 1112 (1995); *Lee v. Chica*, 983 F.2d 883 (8th Cir.), *cert. denied*, 510 U.S. 906 (1993); *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253 (7th Cir. 1992); *Advest, Inc. v. McCarthy*, 914 F.2d 6 (1st Cir. 1990); *Jenkins v. Prudential-Bache Sec., Inc.*, 847 F.2d 631 (10th Cir. 1988).

issue, the Court summarized the standards of review applied by federal courts reviewing arbitral decisions on the merits:

> [A] party [that has been required to arbitrate] still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances, See, e.g., 9 U.S.C. § 10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers); *Wilko v. Swan*, 346 U.S. 427, 436-37, 74 S.Ct. 182, 187-188, 98 L.Ed. 168 (1953) (*parties bound by arbitrator's decision not in "manifest disregard" of the law*), overruled on other grounds, *Rodriguez de Quijas v. Shearson/ American Express, Inc.*, 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989).

Id. at 942 (emphasis added). Thus, the Court plainly recognized "manifest disregard" as a valid basis for vacatur of arbitral decisions under federal law and indicated that *Wilko*, insofar as it established that standard, remains good law.[3]

Greenberg's assertion that the Fifth Circuit "does not even recognize the vague concept of manifest disregard," Pet. at 10, is wrong. The case on which Greenberg relies, *Gulf Coast Funds Workers Union v. Exxon Co.*, 991 F.2d 244 (5th Cir. 1993), was expressly rejected in a later Fifth Circuit decision, which concluded that the above-quoted language in

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[3] *See also Shearson/American Express v. McMahon*, 482 U.S. 220 (1987) (Blackmun, J., concurring in part and dissenting in part) (judicial review of arbitral awards "substantially limited" to explicit grounds listed in FAA § 10 "and to the concept of 'manifest disregard' of the law"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656-57 (1985) (Stevens, J., dissenting) ("Arbitration awards are only reviewable for manifest disregard of the law[.]").

First Options compelled the lower courts to review arbitration awards for "manifest disregard of the law." *See Williams*, *supra*, 197 F.3d at 757-59. In *Williams*, the Fifth Circuit stated:

> In our opinion, clear approval of the "manifest disregard" of the law standard in the review of arbitration awards under the FAA was signaled by the Supreme Court's statement in *First Options* that "parties [are] bound by [an] arbitrator's decision not in 'manifest disregard' of the law."

Id. at 759 (quoting 514 U.S. at 942). At least two other circuits have construed *First Options* in the same manner. *See Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1460 (11th Cir. 1997); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1486 (D.C. Cir. 1997).

Moreover, although circuits have adopted varying formulations of the review mandated by the manifest disregard doctrine, *see Cole*, 105 F.3d at 1486-87 & n.20 (giving examples), Greenberg makes no claim that the outcome of this case would have been different under the standard as applied in any circuit. Nor does he contend that any circuit applying the standard accords less deference to arbitral decisions than that given by the Second Circuit in the decision below. Indeed, the Fifth Circuit's refusal to apply manifest disregard in *Gulf Coast Funds*, *supra*, on which Greenberg relies, would have resulted in even narrower review of the Award than both lower courts conducted here. Thus, even if some disagreement about the manifest disregard standard existed among the circuits, this case would not be a proper vehicle for resolving such a conflict.

II. This Court Has Previously Rejected Any Special Standard of Review for Arbitral Decisions Under the Federal Securities Laws.

Greenberg also contends that, even if "manifest disregard" is nominally the proper standard, arbitral decisions concerning "the rights of investors under the Federal Securities Act" should be subject to "effective," *i.e.*, heightened, judicial review. Pet. at 13. In support of that contention, the Petition advances a generalized attack on the fairness of the securities industry arbitration system in disputes brought by individual investors. *See* Pet. at 10-13. These arguments, however, fly in the face of this Court's prior decisions affirming the legitimacy of securities arbitration. Greenberg fails to demonstrate any basis for the Court to revisit these issues again here.

In *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987), this Court held that pre-dispute arbitration agreements are enforceable with respect to claims under § 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j. *McMahon* rejected the "general suspicion of the desirability of arbitration and the competence of arbitral tribunals" that had informed the Court's prior holding in *Wilko v. Swan*, *supra*, which held claims under § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2), to be non-arbitrable. *See McMahon*, 482 U.S. at 233. The *McMahon* Court expressly noted the "intervening changes" in securities industry arbitration procedures that had occurred since *Wilko*, including the 1975 Exchange Act amendments giving the Securities Exchange Commission "expansive power" to approve, "'abrogate, add to, and delete from' any SRO rule" to accord with the requirements of the Exchange Act. *Id.* (quoting 15 U.S.C. § 78s(c)). Thus, the Court concluded:

> In short, the Commission has broad authority to oversee and to regulate the rules adopted by

> the SROs relating to customer disputes, including the power to mandate the adoption of any rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights.

Id. at 233-34. This reasoning was reaffirmed by the Court two years later in *Rodriguez de Quizas v. Shearson/American Express, Inc.*, *supra*, which explicitly overruled the holding of *Wilko* on non-arbitrability of § 12(2) claims. *See* 490 U.S. at 477.

In light of the Court's pronouncements in *McMahon* and *Rodriguez de Quizas*, Greenberg's general allegations of bias in the securities arbitration system at most raise policy matters that should be addressed to the SEC and the SROs, not this Court. The Petition cites no evidence that these regulatory authorities have not performed their duty to oversee this system in the public interest, consistent with the purpose of the federal securities laws. Indeed, the First Circuit recently rejected allegations of "structural bias" in the New York Stock Exchange ("NYSE") arbitration procedures, concluding that there was no evidence of bias in, *inter alia*, the organizational structure of the NYSE, the pool of potential NYSE arbitrators, or the procedures for selecting arbitration panels. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 14-15 (1st Cir. 1999). In this case, the NASD procedures that governed the underlying arbitration proceedings were substantially the same as those specifically considered in *McMahon*. Greenberg fails to muster any credible basis for reconsidering the Court's previous approval of SRO-sponsored securities arbitration.

It bears mention that the Petition nowhere suggests the arbitrators in Greenberg's case were actually biased, failed to comply with the relevant NASD procedures, or acted improperly in any way during the arbitration. The panel that issued the Award was indisputably subject to the

system of oversight endorsed in *McMahon*. Had Greenberg believed he had suffered such prejudice, he could have sought to vacate the Award under FAA § 10(a)(2), which expressly provides for vacatur of an award where the arbitrators are guilty of "evident partiality or corruption" or prejudicial "misconduct" in conducting the arbitration proceedings. 9 U.S.C. § 10(a)(2). Greenberg never raised such a claim either in his initial petition to the district court or on further appeal to the Second Circuit. Nor does he attempt to do so here.

Finally, the Petition's appeal for a heightened standard of review in arbitrations involving federal securities claims is in direct conflict with "the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions," *Rodriguez de Quijas*, 490 U.S. at 484. This Court's consideration of a special standard in securities arbitrations would invite similar challenges in other statutory fields where the Court previously has upheld the broad federal policy favoring arbitration. *See, e.g., Mitsubishi Motors Corp., supra*, 473 U.S. at 628-40 (antitrust laws); *McMahon*, 482 U.S. at 240-42 (RICO statutes). As the Court stated in *First Options*: "[I]t is undesirable to make the law more complicated by proliferating review standards without good reasons." 514 U.S. at 948. The Petition offers no good reasons to do so here.

III. The Arbitration Award Was Based on Factual Findings to Which the Court Below Properly Deferred.

At bottom, Greenberg simply asks this Court to find – contrary to the judgment of both courts below – that the arbitrators' decision was "irrational." *See* Pet. at 16. This ordinary exercise of reviewing the Award for manifest disregard of the law does not warrant this Court's attention.

In any event, none of Greenberg's substantive challenges to the Award has any merit.

While the Petition contends that the arbitrators were "irrational" to conclude Bear Stearns had no knowledge of Sterling Foster's fraud, it flatly ignores other sufficient grounds for the rejection of Greenberg's claim under § 10(b) of the Exchange Act. As a clearing firm, Bear Stearns had no duty to disclose even material information to customers of Sterling Foster, including Greenberg. *See, e.g., In re Blech Securities Litigation*, 928 F. Supp. 1279, 1295-96 (S.D.N.Y. 1996) ("Even if Bear Stearns knew but failed to disclose a material fact, no plaintiff can claim to have been defrauded by that omission, because, as a matter of law, a clearing broker owed no duty of disclosure to the clients of an introducing broker."); *Ross v. Bolton*, 904 F.2d 819, 826 (2d Cir. 1990) (same). Moreover, Greenberg failed to demonstrate that Bear Stearns made any affirmative misrepresentation or engaged in any "manipulative or deceptive practice," as required to prove a claim under § 10(b), *see, e.g., SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1467 (2d Cir. 1996). Regardless of *scienter*, the arbitrators could have rejected Greenberg's § 10(b) claim on this wholly independent ground.

The Second Circuit's decision acknowledges this possible basis for the arbitrators' decision. The court concluded that the arbitrators had "ample basis" to find Bear Stearns' conduct insufficient to prove the "substantial assistance" element of a common-law aiding-and-abetting claim, much less the affirmative deception required by § 10(b). *See* 220 F.3d at 29. The Petition does not quarrel with the principle, cited by the Second Circuit, that "'the simple providing of normal clearing services to a primary broker who is acting in violation of the law does not make out a case of aiding and abetting against the clearing broker.'" *Id.* (quoting *Stander v. Financial Clearing & Servs. Corp.*, 730 F. Supp. 1282, 1286 (S.D.N.Y. 1990)).

Although Greenberg contended at the hearing that Bear Stearns had gone beyond "ordinary clearing" for Sterling Foster, this was a disputed factual issue that the arbitrators could have resolved in favor of Bear Stearns. The Petition does not contend otherwise.

Greenberg's insistence that the hearing testimony of certain Bear Stearns witnesses was not credible presented a pure question of fact for the arbitrators, and the decision below properly recognized it as such. *See* 220 F.3d at 28; *see also* 1999 WL 642859, at *1 (S.D.N.Y. Aug.23, 1999) ("The arbitrators credited the testimony of [Bear Stearns] employees and rejected Greenberg's contention .... The Court will not second-guess the credibility findings of the arbitral panel and will not disturb the panel's findings that Bear Stearns lacked knowledge of Sterling Foster's fraud scheme."). The Petition's mere assertion that certain testimony "would be laughed out of court if this case had been before a federal court," Pet. at 14, certainly does not make it so.

Greenberg's attempt to turn this fact-bound credibility dispute into a legal question of "imputed" knowledge also has no merit and was properly rejected. The Petition complains that the Second Circuit did not cite authorities for its conclusion that "'it is by no means clear that the doctrine of imputed knowledge applies in this context.'" Pet. at 5 (quoting 220 F.3d at 28). But the Petition simply ignores explicit case law (which Bear Stearns cited in its appellate brief) holding that knowledge of documents' contents should not be imputed to a financial entity performing high-volume processing functions like those performed by clearing firms. *See Woods v. Bank of New York*, 806 F.2d 368, 369 (2d Cir. 1986). Moreover, as the district court expressly found, the authorities on which Greenberg relies are plainly distinguishable from the circumstances presented in this case. *See* 1999 WL 642859 at *1. The arbitrators did not manifestly disregard the securities laws by refusing to impute

knowledge to Bear Stearns. They simply credited the testimony of Bear Stearns witnesses.

Greenberg's argument concerning allegedly "false confirmations" is equally infirm. The decision below correctly held that the arbitrators could have found the disputed language in the confirmations to be literally true. *See* 220 F.3d at 28. It was undisputed that Sterling Foster was an NASD market-maker in ML Direct securities; the statement in Greenberg's confirmations that Sterling Foster "makes a market in this security" therefore complied with the regulatory requirement that confirmations disclose "whether [the principal] is a market maker in the security." 17 C.F.R. § 240.10b-10(a)(2). In any event, the Petition here fails to address the other sufficient grounds for the arbitrators' rejection of this claim – including the absence of any evidence that Greenberg relied on the allegedly misleading confirmations, thereby causing his losses. *See Press v. Chemical Inv. Servs. Corp.*, 166 F.3d 529, 539 (2d Cir. 1999) (proof of "transaction" causation is an "essential" element of a securities fraud claim).

Finally, there is no foundation for Greenberg's assertion that the decision below failed to enforce 17 C.F.R. § 230.174 ("Rule 174"), which requires a "dealer" or "underwriter" of certain public offerings to deliver a prospectus in connection with sales of a newly issued security. The plain language of the regulation does not impose any duty upon clearing firms, and it was undisputed that Bear Stearns was not an issuer, underwriter or seller of ML Direct or any other relevant securities. Greenberg's alternative contention that Sterling Foster somehow delegated its duties under Rule 174 to Bear Stearns at most raised a factual issue concerning the terms of the relationship between Sterling Foster and Bear Stearns, and that issue was properly resolved by the arbitrators under ordinary principles of New York contract law. In short, none of the arguments in

the Petition remotely suggests a compelling legal question worthy of this Court's review.

IV. Before Reaching Any of the Foregoing Issues, This Court Would Have to Find Subject Matter Jurisdiction Over This Case.

Even if the Petition raised compelling issues for review, this Court could reach them only after determining whether the Second Circuit properly found subject matter jurisdiction over this case. The decision below focuses principally on this question, which concerns the scope of federal jurisdiction, absent diversity of citizenship, over petitions to vacate arbitration awards under FAA § 10. *See* 220 F.3d at 25-28. While none of the parties seeks this Court's review of the jurisdictional issue, it cannot be waived. Since the holding is disputable, it is possible that this Court might never reach the questions presented by the Petition.

The decision below did not disturb the well-settled principle that "the FAA does not confer subject matter jurisdiction on the federal courts even though it creates federal substantive law." *Id.* at 25 (citing *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.9 (1984); *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983)). Rather, applying the jurisdictional analysis set forth in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983), the court below concluded that a petition to vacate under FAA § 10 raises a "substantial federal question" sufficient to confer jurisdiction "where, as here, the petitioner complains principally and in good faith that the award was rendered in manifest disregard of *federal* law." 220 F.3d at 27 (emphasis added). In the court's view, the "process" of determining whether the arbitrators manifestly disregarded federal law "so immerses the federal court in questions of federal law and their proper application that federal question subject matter jurisdiction is present." *Id.*

However, the Second Circuit frankly acknowledged that dicta in other cases suggest the potential for disagreement among federal courts concerning this holding. *See id.* at 27-28 (citing *Kasap v. Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243, 1247 (D.C. Cir. 1999) (suggesting that review for fraud under FAA § 10 implicates federal law but is insufficient to support federal jurisdiction); *Manginelli v. Smith Barney, Inc.*, No. 98 Civ. 8986, 1999 WL 615096, at *2 (S.D.N.Y. Aug. 12, 1999)). The jurisdictional decision below is not squarely in conflict with the law of any other circuit or this Court, and it therefore does not independently merit writ consideration. But given the potential obstacle it raises to review of the main questions presented here, this threshold issue constitutes another compelling reason to deny review of the Petition.

CONCLUSION

Petitioner's real quarrel with the decision below does not concern the standard of review applied, but rather the amply supported conclusion of both lower courts that the Award was not "irrational" or in manifest disregard of the law. There is no reason for this Court to undertake for a third time the conventional task of applying a well-established legal standard to the factual record of this case. Respondents respectfully submit that the Petition should be denied.

Respectfully submitted,

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